

**AMENDMENTS TO THE FEDERAL RULES
OF APPELLATE PROCEDURE**

COMMUNICATION

FROM

**THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES**

TRANSMITTING

AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE THAT HAS BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2074



APRIL 30, 2007.—Referred to the Committee on the Judiciary and ordered
to be printed

U.S. GOVERNMENT PRINTING OFFICE

34-984

WASHINGTON : 2007

LETTER OF SUBMITTAL

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 30, 2007.

Hon. NANCY PELOSI,
Speaker of the House of Representatives,
Washington, DC

DEAR MADAM SPEAKER: I have the honor to submit to the Congress the amendment to the Federal Rules of Appellate Procedure that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, JR.,
Chief Justice.

APR 30 2007

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein an amendment to Appellate Rule 25.

[See infra., pp. _____.]

2. That the foregoing amendment to the Federal Rules of Appellate Procedure shall take effect on December 1, 2007, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL
RULES OF APPELLATE PROCEDURE

Rule 25. Filing and Service

(a) Filing.

* * * * *

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

* * * * *



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

December 21, 2006

MEMORANDUM

To: The Chief Justice of the United States and the Associate Justices of the Supreme Court

From: James C. Duff *James C. Duff*

RE: TRANSMITTAL OF THE PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court a proposed amendment to Rule 25 of the Federal Rules of Appellate Procedure, which was approved by the Judicial Conference at its September 2006 session. The Judicial Conference recommends that this amendment be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering this proposed amendment, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference as well as the Report of the Advisory Committee on the Federal Rules of Appellate Procedure.

Attachments

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

* * * * *

Implementing E-Government Act

The Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules submitted proposed uniform language for an amendment to Appellate Rule 25, and for new Bankruptcy Rule 9037, new Civil Rule 5.2, and new Criminal Rule 49.1 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments and new rules implement the privacy and security provisions of § 205 of the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281), governing electronic filings in federal court. The amendments and rules were published for public comment for a six-month period. The scheduled public hearings were canceled because only one witness requested to testify. That witness testified at the Committee's January meeting with the chairs of the advisory committees present.

The proposed package of amendments and new rules is derived from the privacy policy adopted by the Judicial Conference in September 2001 to address concerns arising from public access to electronic case filings (JCUS-SEP/OCT 01, pp. 52-53). The Conference policy requires that documents in case files generally be made available electronically to the same extent that they are available at the courthouse, provided that certain "personal data identifiers" are redacted in the public file, including the first five digits of a social-security number, the name of a minor, and the date of a person's birth.

In accordance with the Act's call for uniformity, the proposed new rules are identical in many respects. For example, certain pre-existing records of administrative, agency, and state-court proceedings and pro se habeas corpus filings are exempted from the redaction requirement under each of the proposed rules. Under another uniform provision, a court may, for good cause, authorize redaction of information in addition to personal identifiers or limit a nonparty's remote electronic access to documents to safeguard privacy interests. Each proposed rule also permits the filer of a document to elect not to redact the filer's own personal-identifier information, waiving the rule's protections.

There are a few differences in the proposed rules to account for factors unique to each set of rules. Proposed Civil Rule 5.2 specifically limits remote access to social security and immigration electronic case filings. The Social Security Administration and Department of Justice asked the advisory committee to give special treatment to these cases due to the prevalence of sensitive information and the volume of filings. Remote electronic access by nonparties is limited in these cases to the docket and the written dispositions of the court unless the court orders otherwise. Proposed new Criminal Rule 49.1 permits the partial redaction of an individual's home address and an exemption from redaction for certain information needed for forfeitures. Additional filings are exempted from the redaction requirement, including arrest and search warrants, charging documents, and documents filed before the filing of a criminal charge. Proposed Bankruptcy Rule 9037 uses several different terms consistent with terms used in the Bankruptcy Code. It also requires disclosure of the full names of a debtor, even if a minor. New Appellate Rule 25(a)(5) would apply the privacy rule that had applied to the case below to govern in the case on appeal.

The Committee on Court Administration and Case Management raised a concern during the public-comment period that remote electronic access to an indictment might jeopardize the safety of the foreperson signing it. Under Criminal Rule 6(c), the foreperson must sign all indictments, and under Rule 6(f) an indictment must be returned in open court. No empirical data has been presented showing added risks to forepersons whose signatures on indictments have been publicly available. Such evidence as there is suggests that forepersons have not been subject to threat because the indictment has been part of the public case file. Nor is an easy practical administrative solution apparent to redact a foreperson's name from the record. For these reasons and because the advisory committee determined that redaction of the foreperson's name would raise sensitive policy questions about the public nature of criminal proceedings, the advisory committee decided that the issue requires further careful study. The advisory committee will undertake this study promptly. However, the advisory committee decided that the study should not delay proceeding with the proposed new rule. The Committee on Court Administration and Case Management approves of this approach to this issue.

The proposed amendments and new rules are contained in the appendices to this report.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules presented one item for the Committee's action, proposing an amendment to Appellate Rule 25 to implement the E-Government Act, which was discussed above.

The Committee concurred with the recommendation of the advisory committee.

Recommendation: That the Judicial Conference approve the proposed amendment to Appellate Rule 25 and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

THOMAS S. ZILLY
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

SUSAN C. BUCKLEW
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: May 22, 2006 (Revised June 30, 2006)

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Carl E. Stewart, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 28, 2006, in San Francisco, California. The Committee approved proposed new Rule 25(a)(5).

* * * * *

II. Action Item

The Advisory Committee is seeking final approval of proposed new Rule 25(a)(5).

A. Introduction

The Committee proposes to add a new Rule 25(a)(5) that addresses privacy concerns relating to court filings. New Rule 25(a)(5) will take a "dynamic conformity" approach, under which the privacy rules applicable below will also apply on appeal. In proceedings other than appeals from a district court, bankruptcy appellate panel, or bankruptcy court, privacy will be governed by new Civil Rule 5.2 (except that when an extraordinary writ is sought in a criminal case, new Criminal Rule 49.1 will govern).

**PROPOSED AMENDMENT TO THE FEDERAL
RULES OF APPELLATE PROCEDURE***

Rule 25. Filing and Service

(a) Filing.

* * * * *

(5) Privacy Protection. An appeal in a case whose
privacy protection was governed by Federal Rule of
Bankruptcy Procedure 9037, Federal Rule of Civil
Procedure 5.2, or Federal Rule of Criminal
Procedure 49.1 is governed by the same rule on
appeal. In all other proceedings, privacy protection
is governed by Federal Rule of Civil Procedure 5.2,
except that Federal Rule of Criminal Procedure 49.1
governs when an extraordinary writ is sought in a
criminal case.

* * * * *

* New material is underlined; matter to be omitted is lined through.

Committee Note

Subdivision (a)(5). Section 205(c)(3)(A)(i) of the E-Government Act of 2002 (Public Law 107-347, as amended by Public Law 108-281) requires that the rules of practice and procedure be amended “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” In response to that directive, the Federal Rules of Bankruptcy, Civil, and Criminal Procedure have been amended, not merely to address the privacy and security concerns raised by documents that are filed electronically, but also to address similar concerns raised by documents that are filed in paper form. *See* FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; and FED. R. CRIM. P. 49.1.

Appellate Rule 25(a)(5) requires that, in cases that arise on appeal from a district court, bankruptcy appellate panel, or bankruptcy court, the privacy rule that applied to the case below will continue to apply to the case on appeal. With one exception, all other cases — such as cases involving the review or enforcement of an agency order, the review of a decision of the tax court, or the consideration of a petition for an extraordinary writ — will be governed by Civil Rule 5.2. The only exception is when an extraordinary writ is sought in a criminal case — that is, a case in which the related trial-court proceeding is governed by Criminal Rule 49.1. In such a case, Criminal Rule 49.1 will govern in the court of appeals as well.

CHANGES MADE AFTER PUBLICATION AND COMMENT

The rule is a modified version of the provision as published. The changes from the published proposal implement suggestions by

FEDERAL RULES OF APPELLATE PROCEDURE 3

the Style Subcommittee of the Standing Committee on Rules of Practice and Procedure.

* * * * *

○